No. 80-1412

In the Supreme Court of the United States

October Term, 1980

GEORGE R. IHLE, IDA M. IHLE,
his wife, and NEW SOUTH
ENTERPRISES, INC.,
Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
405 Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Respondent

JOHN F. GAILLARD
P.O. Box 1949-F
Jacksonville, Florida 32231
(904) 359-4111

GEORGE D. GABEL, JR.
405 Florida Title Building
Jacksonville, Florida 32202
(904) 353-7166
Of Counsel

MARCH, 1981

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

It is difficult to understand from the Petition the question Petitioners seek to have reviewed here. We suggest the question might be stated as follows:

> When a newspaper publishes a food review on a public restaurant, which restaurant admittedly is seeking public patronage and the opinion of the public on its food and service, is the newspaper liable for stating its honest *opinion* of such food and service based on stated facts?

The Courts below held:

> "Construing the case here most strongly against Defendant there is no basis on which a jury could find actionable libel. What we have here is an expression of opinion about a business which advertised to the public, solicited the business of the public, and solicited the opinion of the public on the business. Plaintiffs have repeatedly conceded in their depositions that what the newspaper here did was to publish an opinion on the business and service of the Plaintiffs, clearly authorized by *Gertz v. Welch* and the other cases cited supra." (Petition A6).

PARTIES TO PROCEEDING

All parties to the proceeding are listed in the Caption.

TABLE OF CONTENTS

Questions Presented for Review I
Parties to Proceeding I
Concise Statement of Case 1
Reasons Why Writ Should Not Be Allowed 5
Recent Cases 7
Conclusion 9

Table of Authorities

Anton v. St. Louis Newspaper (Mo.App. 1980), 5 Med. L.Rptr. 2601 7
Belton v. Braham (N.Y. Supreme Court No. 2623/80-8/5/80), 6 Med.L.Rptr. 1787 8
Block v. Desert Sun (Calif. C.A., April 15, 1980), 6 Med.L.Rptr. 1368 8
Bon Air v. Time (U.S.C.A. 5-1970), 426 F.2d 858 8
Bortel v. Citizens for Better Care (Mich. Court of Appeals-7/3/80), 6 Med.L.Rptr. 1797 8
John L. Brewer v. Memphis Publishing Co. (C.A. 5-No. 77-2254, 10/2/80), 626 F.2d 1238 8
Burns v. Denver Post (Col.App. 1979), 5 Med.L.Rptr. 2004, 606 P.2d 1310 8
Burns v. Denver Post (Col.App. 1980), 6 Med.L.Rptr. 2415 8
Coleman, et al. v. Collins (Fla. D.C.A. 5-June 30, 1980), 384 So.2d 229 8
Craig v. Moore (C.C. Duval 1978), 48 Fla.Supp. 29, 4 Med.L.Rptr. 1402 5
Damron v. Ocala Star-Banner (Fla. D.C.A. 1-1962), 263 So.2d 291 8

PREVIOUS PAGE WAS BLANK

Desert Sun v. California Superior Court (Calif. Court of Appeals 1979), 5 Med.L.Rptr. 1881 7

Dupler v. Mansfield Journal (Ohio Court of Appeals 1979), 5 Med.L.Rptr. 2269, 2274 7

Early v. Palm Beach Newspapers (Fla. D.C.A. 4-1976), 334 So.2d 50; appeal dismissed and cert. den. (Fla. 1977), 354 So.2d 351, 3 Med.L.Rptr. 2183, cert. den., 439 U.S. 910 (10-16-78) 5

Fitzgerald v. Minnesota Chiropractic Association (Minn. S.Ct., April 4, 1980), 6 Med.L.Rptr. 1392 8

Gertz v. Welch, 418 U.S. 323 at 339 and 340 .....3, 5, 6, 7, 8, 9

Holy Spirit Association v. Sequoia Elsevier (Appellate Division, N.Y. Supreme Court, April 11, 1980), 6 Med.L.Rptr. 1191, 1192 8

Loeb v. Globe Newspaper (U.S.D.C. Mass. February 1, 1980), 6 Med.L.Rptr. 1235 8

Long v. Arcell (U.S.C.A. 5-June 13, 1980), 618 F.2d 1145 8

McIntyre v. Westinghouse (U.S.D.C. Mass. 1979), 479 F.Supp. 808, 5 Med.L.Rptr. 2459 7

Mashburn v. Collin (La. S.Ct. 1977), 355 So.2d 879, 3 Med.L.Rptr. 1673 5

Miami Herald v. Tornillo (1974), 418 U.S. 241 6

Myers v. Boston Magazine (Mass. Supreme Judicial Court), 6 Med.L.Rptr. 1241 8

Naked City v. Chicago Sun Times (Ill.App. 1979), 5 Med.L.Rptr. 1806 7

National Association v. Central Broadcasting (Mass. Supreme Judicial Court 1979), 5 Med.L.Rptr. 2078 7

Ocala Star-Banner v. Damron (1971), 401 U.S. 295 8

Ollman v. Evans (U.S.D.C. 1979), 5 Med.L.Rptr. 1809 7

Steaks Unlimited v. Deaner (U.S.D.C. Pa. 1979), 4 Med.L.Rptr. 2569, aff'd U.S.C.A. 3-4/24/80, 623 F.2d 264, 6 Med.L.Rptr. 1129 5

Stripling v. Literary Guild (U.S.D.C. M.D. Tex. 1979), 5 Med.L.Rptr. 1958 7
Traube v. Arnold (N.Y. 1979), 5 Med.L.Rptr. 2143 7
Washington Post v. Keogh (U.S.C.A. D.C. 1966), 365 F.2d 965 at 968 8
Yiamouyiannis v. Consumers Union (U.S.C.A. 2-1980), 619 F.2d 932 8
Libel, Slander and Related Problems (Robert D. Sack - Practicing Law Institute-1980), p. 154 8
Section 566, Restatement of Law of Torts - 2d Edition 7

No. 80-1412

In the Supreme Court of the United States

October Term, 1980

GEORGE R. IHLE, IDA M. IHLE,
his wife, and NEW SOUTH
ENTERPRISES, INC.,
Petitioners,

vs.

FLORIDA PUBLISHING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA DISTRICT COURT OF APPEAL
FIRST DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

CONCISE STATEMENT OF THE CASE

Petitioners, GEORGE R. IHLE, IDA M. IHLE, and NEW SOUTH ENTERPRISES, INC., do not say to what court below their Petition is addressed,[1] nor do they ask for any particular relief. Nor is their Petition signed.

1. Presumably they desire the writ directed to the Florida District Court of Appeal, First District, and accordingly we so show on our cover.

However, they attach a copy of the summary judgment entered by the Circuit Court of Duval County, Florida (Henry L. Adams, Jr., J) on October 30, 1979 (50 Fla. Supp. ....., 5 Med.L.Rptr. 2005), a copy of the per curiam affirmance thereof by the Florida District Court of Appeal, First District, on October 15, 1980 (..... So.2d ....., 6 Med.L.Rptr. 2081), and a copy of the order of the Supreme Court of Florida dismissing the petition for review, entered November 17, 1980 (..... So.2d ....., 6 Med.L.Rptr. 2298).

Petitioners do not file any kind of a record except the court orders shown above. The appellate decisions are per curiam without opinions, but the summary judgment entered for the defendant by the trial court shows the facts.

We quote paragraphs 1-6 and 10 from the summary judgment for the defendant (Petition A1, A2, A5):

> "1. Plaintiffs sue because the Defendant newspaper on April 26, 1976, ran an article or review of Plaintiffs' restaurant entitled 'It Wasn't a Fancy Meal.'
>
> "2. The article had some favorable comments, but the most unfavorable comments were:
>
> > 'Our food was served. My steak, listed as 10 ounces seemed small. It appeared to have been cooked in a blast furnace, which may have accounted for its scrawny look.
> >
> > 'My spouse found the prime rib rare, as ordered, but reported that it had a strange, unpleasant flavor. Because of its uniform color and overall appearance, we inquired whether it had been cooked in a microwave oven. It had not been, we were told.
> >
> > 'We did not linger afterwards. We paid the $16.77 tab and hurried home to pop one of Mrs.

Smith's frozen blueberry pies in the oven for dessert.'

"3. It is an established principle of law as enunciated in *Gertz v. Welch,* 418 U.S. 323 at pages 339 and 340:

> 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries but on the competition of other ideas.'

"4. Here the reporters who visited the restaurant merely expressed their opinion of the food and service and restaurant. On pages 10, 11, 12, 15, 16, 19, 21, 22, 41, and 49 of the deposition of George R. Ihle, President of the corporate Plaintiff, taken September 6, 1979, he conceded that the reporter expressed 'his opinion.'

"5. Mrs. Ida Ihle, Secretary-Treasurer of the corporate Plaintiff, at her deposition taken the same day, at pages 3, 4, and 7 agreed that the reporter expressed 'his opinion.'

"6. In Mr. Ihle's deposition he said that he advertised to get public patronage, at page 10, and Mrs. Ihle said the same thing at pages 4 and 7 of her deposition. Mrs. Ihle further said that she was interested in the opinions of newspaper reporters (page 5), that she would like to have a reporter come to the restaurant and express his opinion (page 6), and that the purpose of advertising was to get people to come to the restaurant and try it (pages 6 and 7). Introduced into evidence at the depositions were numerous advertisements run by Plaintiff including such language as 'Aw, what an array of delectability,' 'Eat,

drink and be merry,' and several times 'Here's a meal you can't refuse.'

"10. The article sued on by Plaintiff here is clearly an expression of opinion on an establishment of public interest, a restaurant 'actively engaged in advertising and seeking commercial patronage.' See page 10 of Ihle deposition and pages 4-7 of Mrs. Ihle's deposition. We quote from page 7: 'Mr. Wahl, I wanted everybody to come. I wasn't ashamed of our restaurant—wanted the whole world to come to our restaurant and see what they found and express their opinion—and express their opinions to their friends.' "

Plaintiffs were not only given the name of the reporter who wrote the review, but attached to defendant's motion for summary judgment was the affidavit of the reporter Lloyd Brown. We quote from that affidavit:

"BEFORE THE SUBSCRIBER personally appeared Lloyd Brown, who, being first duly sworn, deposes and says:

"I am a member of the editorial staff of the Jacksonville Journal and have been with the Journal for 22 years.

"I wrote the article about the New South Restaurant which appeared in the Jacksonville Journal on or about August 22, 1976, and which is the subject of this suit, George R. Ihle, Ida M. Ihle, his wife, and New South Enterprises, Inc., Plaintiffs, vs. Florida Publishing Company, Defendant.

"It is customary for the Journal to have articles written on restaurants and eating places and to use the name Jean Romain for such reviews. They were written by a number of different reporters.

"I have again reviewed my article and repeat that it was my honest opinion of the food and service I found at that restaurant.

"I do not know Mr. or Mrs. Ihle personally and have no feeling one way or another toward them. My wife and I simply had dinner at their restaurant, for which we paid the published price, and I wrote a review giving my honest opinion of the restaurant and its food and service."

Plaintiffs chose not to answer that affidavit nor to take Brown's deposition. The affidavit was served over a month prior to the hearing on motion for summary judgment.

REASONS WHY WRIT SHOULD NOT BE ALLOWED

Here there is a clear expression of honest opinion, based on stated facts, on the food and service of a restaurant which advertised for, and sought, the opinion of the public (as frankly conceded over and over again by plaintiffs).

Under *Gertz*, the other cases cited by the trial court,[2] and those cited in footnote 3 hereto, there is no cause of action here for libel (or, for that matter, for anything else).

Plaintiffs apparently try to state a cause of action because the newspaper had a policy of publishing its food reviews under the name of Jean Romain. Obviously if

---

2. See particularly *Mashburn v. Collin* (La. S.Ct. 1977), 355 So.2d 879, 3 Med.L.Rptr. 1673; *Craig v. Moore* (C.C. Duval 1978), 48 Fla.Supp. 29, 4 Med.L.Rptr. 1402; *Steaks Unlimited v. Deaner* (U.S.D.C. Pa. 1979), 4 Med.L.Rptr. 2569, aff'd U.S.C.A. 3-4/24/80, 623 F.2d 264, 6 Med.L.Rptr. 1129; and *Early v. Palm Beach Newspapers* (Fla. D.C.A. 4-1976), 334 So.2d 50, appeal dismissed and certiorari denied (Fla. 1977), 354 So.2d 351, 3 Med.L.Rptr. 2183; certiorari denied, 439 U.S. 910 (10-16-78).

the restaurants know that the customer is Jean Romain, a newspaper critic, at the time they serve him, he can not get the ordinary regular brand of service on which to comment.

But long before the hearing the plaintiffs not only had the name, identity and address of the critic, but a full affidavit from him. They chose not to depose him.

It is significant plaintiffs cite not a single case in support of their position.

The trial court found in paragraph 14 of the summary judgment (A6):

> "Plaintiff in Count II complained under F.S. 836.03, which makes it a criminal offense to publish an anonymous publication in which 'any person is attacked in his good name or it is attempted to bring disgrace or ridicule upon him.'
>
> "In the first place, this is a criminal statute and not a civil one. Next, there is nothing more here than an expression of opinion based on stated facts. More importantly it cannot be construed to contravene the express holding of the United States Supreme Court in *Gertz, supra,* that any person has the right to express his opinion. Cf. *Miami Herald v. Tornillo* (1974), 418 U.S. 241."

The statute relied on by plaintiffs simply has no application here under the facts, as shown by the findings above quoted.

Plaintiffs never made any attempt to sue the reporter-critic, even when they had his identity, but sued only his employer, the newspaper, which accepted full responsibility for the article. All conceded the article was an expression of opinion.

RECENT CASES

Following *Gertz*, the law is summarized in the black faced Section 566 - Restatement of the Law of Torts, Second Edition - as follows:

"§566. Expressions of Opinion

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

Recent cases (published since the date of the summary judgment here) upholding judgment for defendant on expressions of opinion are cited in footnote hereto.[3]

---

3. *Naked City v. Chicago Sun Times* (Ill.App. 1979), 5 Med.L.Rptr. 1806, on editorial opinion that pageant amounted to "pornography"; *Ollman v. Evans* (U.S.D.C. D.C. 1979), 5 Med.L. Rptr. 1809, on syndicated columnist's expressed opinion that professor was "political Marxist" and denigrating his reputation as a scholar; *Stripling v. Literary Guild* (U.S.D.C. M.D. Tex. 1979), 5 Med.L.Rptr. 1958, on published opinion that plaintiff was a "scoundrel"; *McIntyre v. Westinghouse* (U.S.D.C. Mass. 1979), 479 F.Supp. 808, 5 Med.L.Rptr. 2459, on editorial opinion that activities of minister were "sowing seeds of distrust" between United States and Russia; *Dupler v. Mansfield Journal* (Ohio Court of Appeals 1979), 5 Med.L.Rptr. 2269, 2274, reversing lower court and ordering judgment for publisher on expression of opinion that candidate had violated Ohio laws as a private investigator; *Anton v. St. Louis Newspaper* (Mo.App. 1980), 5 Med.L.Rptr. 2601, upholding dismissal of libel suit on basis libelous per se statement was expression of opinion about non public figure attorney for which no cause of action would lie; *Traube v. Arnold* (N.Y. 1979), 5 Med.L.Rptr. 2143, dismissing libel suit of "enthusiastic small time agent" and upholding use of "rhetorical hyperbole or epithets" in opinion; *National Association v. Central Broadcasting* (Mass. Supreme Judicial Court 1979), 5 Med.L.Rptr. 2078, reversing lower court and ordering summary judgment for radio station on expressing opinion that unionization sought was "inroads of communism", citing *Gertz; Desert Sun v. California Superior Court* (Calif. Court of Appeals 1979), 5 Med.L.Rptr. 1881, where appellate court reversed trial court and directed entry of summary

(Continued on following page)

Footnote continued—

judgment for publisher expressing an opinion that plaintiff was guilty of "political chicanery"; *Burns v. Denver Post* (Col.App. 1979), 5 Med.L.Rptr. 2004, 606 P.2d 1310, where summary judgment for newspaper was upheld on appeal when it published what court construed to be husband's opinion of why libel plaintiff wife divorced him; *Holy Spirit Association v. Sequoia Elsevier* (Appellate Division, New York Supreme Court, April 11, 1980), 6 Med.L.Rptr. 1191, 1192; *Loeb v. Globe Newspaper* (U.S.D.C. Mass. February 1, 1980), 6 Med.L.Rptr. 1235; *Myers v. Boston Magazine* (Mass. Supreme Judicial Court), 6 Med.L.Rptr. 1241; *Long v. Arcell* (U.S.C.A. 5-June 13, 1980), 618 F.2d 1145; *Block v. Desert Sun* (Calif. C.A., April 15, 1980), 6 Med.L.Rptr. 1368; *Fitzgerald v. Minnesota Chiropractic Association,* (Minn. S.Ct., April 4, 1980), 6 Med.L.Rptr. 1392; *Yiamouyiannis v. Consumers Union* (U.S.C.A. 2-1980), 619 F.2d 932; *Coleman, et al. v. Collins* (Fla. D.C.A. 5-June 30, 1980), 384 So.2d 229; *Belton v. Braham* (N.Y. Supreme Court No. 2623/80-8/5/80), 6 Med.L.Rptr. 1787; *Bortel v. Citizens for Better Care* (Mich. Court of Appeals-7/3/80), 6 Med.L.Rptr. 1797; *John L. Brewer v. Memphis Publishing Co.* (C.A. 5-No. 77-2254, 10/2/80), reported at 626 F.2d 1238, where the Fifth Circuit reversed the trial court and ordered judgment entered for the newspaper defendant even though the publication was not accurate or correct, and *Burns v. Denver Post* (Col.App. 1980), 6 Med.L.Rptr. 2415, reversing the lower court and holding that statement that family had "deserted" plaintiff was a constitutionally protected statement of opinion, citing among others the first *Burns* case at 606 P.2d 1310.

The Florida court has on numerous occasions affirmed summary judgment for the publisher in libel and privacy actions. See *Damron v. Ocala Star-Banner* (Fla. D.C.A. 1-1962), 263 So.2d 291 - summary judgment was there entered after remand from United States Supreme Court reversing judgment for plaintiff - *Ocala Star-Banner v. Damron* (1971), 401 U.S. 295. Two of the best explanations for the necessity for summary judgment in First Amendment cases are found in *Washington Post v. Keogh* (U.S.C.A. D.C. 1966), 365 F.2d 965 at 968, and *Bon Air v. Time* (U.S.C.A. 5-1970), 426 F.2d 858.

In *Libel, Slander and Related Problems* (Robert D. Sack - Practicing Law Institute-1980), p. 154, it is held:

> In *Gertz* "the Court asserted that as a matter of constitutional law there can be no such thing as a false idea or opinion. This principle, together with the implication in *Gertz* that only a falsehood can be defamatory, seems to lead inexorably to a powerful syllogism: A defamation is actionable only if it is false; opinions cannot be false; therefore opinions can never be actionable even if defamatory."

CONCLUSION

It is clear that (1) the petition fails to meet the rules or show any basis for certiorari and (2) under *Gertz* and its progeny plaintiffs have no cause of action for an honest opinion upon stated facts.

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
405 Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Respondent

JOHN F. GAILLARD
P.O. Box 1949-F
Jacksonville, Florida 32231
(904) 359-4111

GEORGE D. GABEL, JR.
405 Florida Title Building
Jacksonville, Florida 32202
(904) 353-7166
Of Counsel

MARCH, 1981